Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-453

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

METRO BROADCASTING, INC.,
Petitioner,
v.
FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICUS CURIAE* JEROME THOMAS LAMPRECHT IN SUPPORT OF PETITIONER

M. MILLER BAKER
DILWORTH, PAXSON, KALISH & KAUFFMAN
1001 Pennsylvania Ave., N.W.
Suite 275 North
Washington, D.C. 20004
(202) 624-5922
Of Counsel

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041
Counsel of Record

February 9, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTERESTS OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	9
ARGUMENT	10
I. THE COURT SHOULD REACH THE ISSUE OF THE CONSTITUTIONALITY OF THE FEMALE PREFERENCE	10
II. THE FCC HAS NOT CARRIED ITS BURDEN OF ESTABLISHING THAT THE FEMALE PREFERENCE IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF PROGRAMMING "DIVERSITY"	12
CONCLUSION	17

TABLE OF AUTHORITIES

Cases: Page

Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) 16
Astroline Communications Co. v. Shurberg Broadcasting of Hartford, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, 58 U.S.L.W. 3417 (Jan. 9, 1990) 7
Caban v. Mohammed, 441 U.S. 380 (1979) 14
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 11
Citizens Communications Center v. FCC, 447 F.2d 1201 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972) 6
City of Richmond v. J.A. Croson, —— U.S. ——, 109 S.Ct. 706 (1989) 13
Craig v. Boren, 429 U.S. 190 (1976) 16
Fullilove v. Klutznick, 448 U.S. 448 (1980) 13
Garrett v. FCC, 513 F.2d 1056 (D.C. Cir. 1975) 7
Jerome Thomas Lamprecht v. FCC, No. 88-1395 (D.C. Cir. filed June 1, 1988) 1
Johnson v. Transportation Agency, —— U.S. ——, 107 S.Ct. 1441 (1987) 13
Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) 16
Michael M. v. Superior Court, 450 U.S. 464 (1981) 14
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982) 12, 16
New York City Transit Authority v. Beazer, 440 U.S. 568 (1979) 12
Parham v. Hughes, 441 U.S. 347 (1979) 14
Robert v. United States Jaycees, 468 U.S. 609 (1984) 15
Rostker v. Goldberg, 453 U.S. 57 (1981) 14
Steele v. FCC, 770 F.2d 1192 (D.C. Cir. 1985), *reh'g granted and opinion vacated* (Oct. 31, 1985) 14, 16, 17
TV 9, Inc. v. FCC, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974) 6

TABLE OF AUTHORITIES—Continued

Page

Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) 14
West Michigan Broadcasting Co. v. FCC, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) 7
Winter Park Communications, Inc. v. FCC, 873 F.2d 347 (D.C. Cir. 1989), *cert. granted*, 58 U.S.L.W. 3417 (Jan. 9, 1990) 11, 12, 13

Administrative Decisions:

Gainesville Media, Inc., 70 F.C.C.2d 143 (1978) 7
In re Application of Jerome Thomas Lamprecht, et al., FCC 84D-42 (released June 14, 1984) 3, 5
In re Application of Jerome Thomas Lamprecht, et al., 99 F.C.C.2d 1219, 57 Rad.Reg.2d 1194 (1984) 1, 5
Mid-Florida Television Corp., 70 F.C.C.2d 281 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981) 7, 8, 14, 15
Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 6

Miscellaneous:

Comment, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses*, 83 Nw. U. L. Rev. 665 (1989) 7
47 U.S.C. Sec. 155(c)(3) 12
47 U.S.C. Sec. 303 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-453

METRO BROADCASTING, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF OF *AMICUS CURIAE* JEROME THOMAS LAMPRECHT IN SUPPORT OF PETITIONER

INTERESTS OF *AMICUS CURIAE*

Introduction

The Federal Communications Commission (the "FCC" or the "Commission") extends preferential treatment to female applicants for FM radio stations in comparative evaluation proceedings. In 1983, *amicus curiae* Jerome Thomas Lamprecht applied for and was later denied the opportunity to own an FM radio station pursuant to the Commission's gender preference policy. *In re Application of Jerome Thomas Lamprecht, et al.*, 99 F.C.C.2d 1219, 57 Rad.Reg.2d 1194 (1984). *Amicus* is currently suing the Commission for discriminating against him on the basis of sex in violation of the United States Constitution. *Jerome Thomas Lamprecht v. Federal Communications Commission, et al.*, No. 88-1395 (D.C. Cir. filed June 1, 1988).

The preferential treatment policy employed by the Commission to advance women is a component of its more comprehensive preference policy toward minority applicants. This Court's ruling with respect to the constitutionality of the FCC's minority preference policy in the case *sub judice* will necessarily affect, and may well prove determinative of, *amicus*'s pending challenge to the Commission's female preference scheme. *Amicus* is therefore participating in the instant case in order to preserve his rights below.

Amicus's brief focuses almost exclusively upon the Commission's merit policy as it relates to female ownership and participation in FM radio station comparative hearings. It presents the Court with an additional concrete example of how the Commission's gratuitously decreed preference scheme has worked to rob an otherwise fully qualified individual of the opportunity to operate a radio station. To the extent the Court may be compelled to consider the constitutionality *vel non* of that policy in the instant proceeding, *amicus*'s brief should provide it with useful factual material. *Amicus*'s brief is filed with consent of all parties.

Amicus's Particular Interests

In 1983, *amicus* Lamprecht, Barbara D. Marmet ("Marmet"), and two other applicants, filed mutually exclusive applications seeking authority to operate a new FM broadcast station at Middletown, Maryland, on Channel 276A (103.1 MHz).[1]

---

[1] The other applicants were Port Royal Broadcasting and Dragon Communications, Inc. While Port Royal has since withdrawn from the proceedings, Dragon has intervened in *amicus*'s pending litigation against the Commission. Because the Commission viewed *amicus* as Marmet's most serious challenger throughout all stages of the comparative hearing process, a description of Port Royal's and Dragon's qualifications to run the proposed station will be omitted in what follows.

Lamprecht is originally from Maryland. He was born, raised and educated there. He plans to reside in Middletown as the proposed station's full-time general manager if awarded the radio license he seeks. He holds a B.S. degree in radio, television, and film from the University of Maryland and has more than fifteen years of broadcast experience in a variety of management and non-management positions at radio stations. Lamprecht's ownership interest in other broadcast media under existing Commission standards is *de minimis*; greater media diversification of ownership would result from awarding the license to him.

Marmet is from Omaha, Nebraska. She is a graduate of Bradford College and the University of Michigan where she received a B.A. in Liberal Arts, majoring in Sociology. She has business experience acquired through several different projects including working as a representative for a college admissions office, serving on the Board of Directors and as Treasurer of Planned Parenthood of Metropolitan Washington, working as a part-time bookkeeper and engaging in real estate management. She plans to operate the new stations as its full-time general manager. She has no broadcast experience. She has resided within the proposed station area since 1979 and has engaged in some civic activities since that time.

In 1984, an Administrative Law Judge ("ALJ") conducted hearings to determine which applicant would best serve the public interest. *In re Application of Jerome Thomas Lamprecht, et al.*, FCC 84D-42 (released June 14, 1984). Each applicant was ranked according to the five comparative criteria presently employed by the Commission to resolve competing claims to a broadcast license: (1) quantitative integration[2]; (2) qualitative integra-

---

[2] "Quantitative integration" refers to the degree to which each applicant will integrate corporate ownership into the day-to-day management of the station.

tion[3]; (3) auxiliary power[4]; (4) comparative coverage[5]; and (5) minority or female enhancement.[6]

The ALJ found Lamprecht's and Marmet's quantitative integration factors to be off-setting. Despite Marmet's lack of broadcast experience, the ALJ awarded her a "slight preference" over Lamprecht in terms of qualitative integration.[7] Because Marmet proposed auxiliary power, whereas Lamprecht did not, she was also given a slight additional comparative preference. Finally, the ALJ granted Marmet a "substantial preference" over Lamprecht in consideration of the Commission's female enhancement policy. The ALJ summed up the matter bluntly:

> On this criterion, Lamprecht suffers from a birth defect: he was born a white, Anglo-Saxon, male. They are not in demand under the Commission's present deregulatory, comparative scheme. . . . There was a day, in the dim and distant past, when Lamprecht might well have prevailed in this comparative contest. His educational background is broadcast-oriented. He has both management and non-management experience. He is a young man who appears aggressive enough to make a substantial contribution to his chosen career. In short, he's ready for an ownership role. But, in this day and age, it is doubtful that he could win any comparative proceeding.

In re Application of Jerome Thomas Lamprecht, FCC 84D-42 (released June 14, 1984) at 11.

The ALJ thereupon granted Marmet's application for the license. There can be little doubt but that her qualitative enhancement as ar integrated female owner with local residence overcame Lamprecht's enhancement for substantial past broadcast experience and was responsible for her being awarded the license.

The Review Board affirmed the ALJ's ruling. It awarded Marmet very slight preferences for service area residence and civic participation and a more substantial preference for female integration as a general manager. The Review Board termed the ALJ's remarks concerning the comparative disadvantages of being a white male "hyperbole" and dismissed Lamprecht's equal protection challenge to the female preference awarded Marmet, stating "Femaleness is recognized by the Commission as a proper comparative enhancement factor [citation omitted], and it has been given no more and no less than its due here." *In re Application of Jerome Thomas Lamprecht*, 57 Rad.Reg.2d 1194, 1200 (1984). The Commission affirmed the Review Board's decision without opinion. Lamprecht's appeal to the D.C. Circuit followed shortly thereafter.

The Commission's Female Preference Policy

The Communications Act of 1934 authorizes the FCC to regulate communication by wire and radio, prescribe

---

[3] "Qualitative integration" refers to the attributes each applicant will bring to the station's daily management, *i.e.*, past broadcast experience, past broadcast education and general business experience.

[4] The Commission inquiry here focuses on the extent to which an applicant has indicated that it will provide an auxiliary power supply to assure continuous operation in the event of a power failure.

[5] The "comparative coverage" factor concerns whether an applicant deserves a preference because of a superior area and/or population proposal. It was not an issue at this hearing and will not be discussed below.

[6] The Commission awards a preference to minority and female applicants on the basis of its own speculation and conjecture that increased minority and female ownership of broadcasting facilities will promote the public interest in fostering diversity of viewpoint in the mass media. As noted below at 14-17, there is no evidence to support the Commission's assertions in this regard.

[7] According to the ALJ, Marmet's past education, her overall business experience, her local residency, and her civic involvement permitted the conclusion that she could adequately manage the station.

the qualifications of radio station operators, and issue broadcasting licenses "as public convenience, interest, or necessity requires." 47 U.S.C. Sec. 303 (1982). In reterpreting the Act's public interest standard, the Commission has held that "a maximum diffusion of control of the media of mass communication, generally referred to as diversification" is a primary goal. *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965). The Commission applies the diversity rationale in the comparative licensing process when it considers "the extent to which the ownership of the media will be concentrated or diversified by the grant of one or another of the applications before it." *Citizens Communications Center v. FCC*, 447 F.2d 1201, 1213 n.36 (D.C. Cir. 1971), *clarified*, 463 F.2d 822 (D.C. Cir. 1972).

The Communications Act does not mention a minority preference policy, to say nothing of a gender preference policy, and the Commission originally interpreted it to be in accordance with the principle of non-discrimination: an applicant's race or gender was not considered or deemed relevant in comparative license hearings.

The Commission's original policy and practice of nondiscrimination came under attack in *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986 (1974), following the Commission's refusal to award comparative merit to a corporate applicant that claimed the merit because it had two black shareholders. In *TV 9*, the D.C. Circuit rejected the Commission's practice of adhering to non-discrimination in interpreting the Act's public interest standard. It held that "when minority ownership is likely to increase diversity of content, especially of opinion and viewpoint, merit should be awarded." *Id.* at 938. The court explicitly refused to require that the award of merit be linked to a prior empirical finding by the Commission that minority involvement would produce superior program service. *Id.* at 941. In refusing to require tangible proof that minority participation in station ownership would increase

diversity of programming content, the court held that a preference should automatically be granted to a minority applicant if there was a "[r]easonable expectation" that such participation would produce a public interest benefit. *Id.* at 938.[8]

In accordance with the court's order, the Commission began recognizing minority ownership and participation as affirmative factors that enhanced an applicant's proposal in the comparative evaluation process. Soon, the Commission began actively promoting a series of administrative devices designed to increase minority ownership opportunities.[9]

In *Mid-Florida Television Corp.*, 70 F.C.C. 2d 281 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203 (1981) an applicant in an FM radio license proceeding asked the Commission to grant it enhanced merit because of the presence of a woman owner.[10] The Com-

[8] The D.C. Circuit has reaffirmed and expanded the *TV 9* decision in subsequent cases. See, *e.g.*, *Garrett v. FCC*, 513 F.2d 1056 (D.C. Cir. 1975) (reaffirming that minority ownership and participation are likely to bring about programming responsive to minority needs); and *West Michigan Broadcasting Co. v. FCC*, 735 F.2d 601 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1027 (1985) (approving award of minority merit preference not only to ensure programming responsive to minority needs but as a means to expose nonminority listeners to minority viewpoints).

[9] One such device, the Commission's policy of offering special "distress sale" relief enabling licensees designated for a hearing on character qualifications issues to apply for assignment of their licenses to minority purchasers is under review by this Court in the companion case, *Astroline Communications Co. v. Shurberg Broadcasting of Hartford*, 876 F.2d 902 (D.C. Cir. 1989), *cert. granted*, 58 U.S.L.W. 3417 (Jan. 9, 1990).

[10] Twelve days prior to the release of its decision in *Mid-Florida*, the Commission issued a Review Board Decision in which it granted "credit" to an applicant because a woman had a one-third ownership interest. *Gainesville Media Inc.*, 70 F.C.C.2d 143 (1978). No rationale was given for granting the credit and more than one commentator has remarked that the grant could arguably be viewed as being *dictum* as it was not outcome determinative. See, *e.g.*, Com-

munications Act does not mention a female preference policy and in contrast to the prevailing minority preference scheme, the Commission was not then under a court order to implement a female preference policy. It nevertheless decided *sua sponte* to award merit for female ownership and participation to the applicant relying upon the diversification rationale underlying the *TV 9* decision:

> We hold that merit for female ownership and participation is warranted upon essentially the same basis as the merit given for black ownership and participation. . . . The basic policy considerations are the same. Women are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership can be of value.

70 F.C.C.2d at 326.

The Commission failed to offer any evidence other than its own assertions of statistical underrepresentation, either at the time of its ruling in *Mid-Florida* or since, to support its declaration that women have been discriminated against in broadcasting or that an increase in female ownership would necessarily increase diversity of programming. Conceding that "the need for diversity and sensitivity reflected in the structure of a broadcast station is not so pressing with respect to women as it is with respect to blacks," *id.* at 326, the Commission decided not to accord female ownership and participation the same weight as that accorded minority ownership and participation.[11] After the *Mid-Florida* decision, female preferences became an integral part of the Commission's comparative broadcast proceedings with the result that individuals such as *amicus* have been denied broadcasting industry opportunities because of their sex.

---

ment, *The Constitutionality of the FCC's Use of Race and Sex in the Granting of Broadcast Licenses*, 83 Nw. U.L. Rev. 665, 679 (1989).

[11] However, as in the case of *amicus* Lamprecht, the female preference may still be outcome determinative.

SUMMARY OF THE ARGUMENT

The Commission's Review Board used the race and gender preferences to award Rainbow a license over Metro. By denying Metro's petition for review, the full Commission adopted the Review Board's reasoning, including the Review Board's reliance on the gender preference, notwithstanding the Commission's discounting the gender preference's significance in the Review Board proceeding. Subsequently, the full Commission acknowledged the gender preference's role in the denial of Metro's license application when the Commission undertook its Congressionally aborted reappraisal of the race and gender preferences. As the gender preference was, in the Commission's own words, of "decisional significance" in the denial of Metro's license application, and as the constitutionality of the gender preference was raised before the Court of Appeals below and in the petition for certiorari granted by this Court, this Court should address that question.

The gender preference is subject to this Court's intermediate standard of equal protection review. As such, the burden is on the Commission to establish that the preference is substantially related to its proffered objective of *programming* diversity. The Commission has failed to carry this burden, and has relied upon speculation and conjecture to support its assertions that the female preference expands programming diversity. The gender preference is manifestly unreasonable as a means of achieving programming diversity, and as such this Court should hold it a violation of the principle of equal protection.

ARGUMENT

I. THE COURT SHOULD REACH THE ISSUE OF THE CONSTITUTIONALITY OF THE FEMALE PREFERENCE

In the Review Board proceeding in which Rainbow was awarded a license over Metro, the Board determined that "Rainbow's substantial minority preference, *in conjunction with its slight female ownership advantage* and solid broadcast experience preference, somewhat outweighs Metro's local residence and civil participation advantage. • • • Therefore, based on its quantitative and qualitative edge, we award Rainbow a slight overall integration preference over Metro." Cert. Pet. App. 88a (emphasis added). The Board then concluded that Rainbow's "slight integration preference" based upon the gender and race preferences was sufficient to "carry the day," and ordered that Rainbow be awarded the license application over Metro. Cert. Pet. App. 90a. Hence, by the very terms of the Review Board decision, a gender-based criterion was a substantial factor, possibly outcome determinative, in Metro's license denial.

The full Commission denied Metro's petition for review of the license denial. Cert. Pet. App. 62a. In so doing, however, the Commission gratuitously opined that "on the facts before us, even if . . . no consideration were given to Rainbow's 5% female participation, it would not change the outcome of this case." Cert. Pet. App. 61a. Notwithstanding those comments, however, the Commission's *denial* of Metro's petition for review had the effect, under 47 U.S.C. Sec. 155(c)(3), of *adopting* the Review Board's decision and reasoning.[12] The Commission's after-the-fact attempt to downplay the significance of the female preference in Metro's license denial is not entitled to any weight.

---

[12] Section 155(c)(3) provides that "any [Review Board] order, decision, report, or action . . . unless reviewed as provided . . . shall have the same force and effect, and shall be made, evidenced, and enforced in the same manner, as orders, decisions, reports, or other actions of the Commission.

When the Commission undertook to review its racial and gender preferences, the Court of Appeals remanded Metro's appeal of its license denial to the Commission. Cert. Pet. App. 58a. On remand, the Commission conceded that "absent credit for its minority *and* female integration, Rainbow *would* lose its qualitative advantage over Metro," and that "deletion of Rainbow's minority and female preferences could reverse the outcome of the case and result in an award to Metro." Cert. Pet. App. 56a-57a (emphasis added). In other words, as the Commission put it, "Rainbow's minority *and* female preferences appear to be decisionally significant." *Id.* (emphasis added). These statements by the Commission were a belated recognition that in denying Metro's petition for review, it had adopted in full the reasoning of the Review Board.

The Commission's award of the license to Rainbow over Metro was in fact based upon both race and gender. The question of the constitutionality of the gender preference was raised below in the Court of Appeals,[13] and is raised in the first question presented for review in the petition for certiorari filed by Metro and granted by this Court. Thus, this Court should address the question even though it was not passed upon by the Court of Appeals. See, *e.g.*, *Capital Cities Cable, Inc. v. Crisp*, 467 U.S.

---

[13] Citing the Commission's *dicta* in its order denying review that the gender preference was not outcome determinative, the Court of Appeals declined to address the constitutionality of the preference. *Winter Park Communications, Inc. v. FCC*, 873 F.2d 347, 352-353 n.5 (1989), *cert. granted*, 58 U.S.L.W. 3417 (Jan. 9, 1990) ("*Winter Park*") [Cert. Pet. App. 10a n.5]. As noted above, the Commission's comments in this regard are not entitled to any weight, and in any event are contradicted by the Commission's subsequent statement upon remand from the Court of Appeals that the "minority *and* female" preferences were "decisionally significant" in the denial of the license to Metro. (Emphasis added.)

691, 697-698 (1984) (rule precluding review of questions not passed upon by the lower court "is not inflexible," particularly in cases coming from federal courts; the Supreme Court addressed question raised in complaint, that was acknowledged, though not passed upon, by both the District Court and the Court of Appeals, and that the parties briefed and argued pursuant to the order granting certiorari); see also *New York City Transit Authority v. Beazer*, 440 U.S. 568, 583 n. 24 (1979) (failure of the Court of Appeals to address statutory issue decided by the District Court did not prevent the Supreme Court from reaching the issue; it was appropriate to reach the issue because it was fully aired before the District Court, it involved the application of settled legal principles to uncontroversial facts, and it had been carefully briefed in the Supreme Court).

II. THE FCC HAS NOT CARRIED ITS BURDEN OF ESTABLISHING THAT THE FEMALE PREFERENCE IS SUBSTANTIALLY RELATED TO THE ACHIEVEMENT OF PROGRAMMING "DIVERSITY"

This Court has held that the party seeking to uphold a statute that classifies individuals on the basis of gender "must carry the burden of showing an 'exceedingly persuasive justification' for the classification." *Mississippi University for Women v. Hogan*, 458 U.S. 718, 724 (1982). The burden is satisfied only by showing that "the classification serves 'important government objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'" *Id.* That the classification at issue discriminates against males rather than females does not exempt it from scrutiny or reduce the standard of review. *Id.* at 723-24.

In this instance, the sole justification that the Commission proffers for its female preference policy is that female broadcast license ownership allegedly contributes to the diversity of broadcast *programming*. *Winter Park*,

supra, 873 F.2d at 356 (Williams, J., concurring in part and dissenting in part) [Cert. Pet. App. 18a].[14] The Court need not reach the question of whether "diversity" in programming is an "important government objective." Even assuming, *arguendo*, that it is, the means employed by the Commission do not satisfy even a rational-basis standard of review, much less the more-exacting substantial relationship test that this Court employs in gender-classification cases.

In assessing whether a governmental entity's gender classification is "substantially related to" the proffered government objective, a reviewing court must determine

---

[14] Even if the Commission were to have claimed a remedial purpose in instituting and defending its female preference policy, the justification would fail for the same reasons that its "diversity" justification fails: the Commission has failed to carry its burden of establishing that the discriminatory means employed are substantially related to that purpose. See, *e.g.*, *Johnson v. Transportation Agency*, —— U.S. ——, ——, 107 S.Ct. 1441, 1461-1462 (1987) (O'Connor, J., concurring in judgment) (the coterminous limitations of Title VII and the Equal Protection Clause require that public entities instituting race- or gender-conscious affirmative action plans must "point to evidence sufficient to establish a firm basis for believing that remedial action is required"); *City of Richmond v. J.A. Croson Co.*, —— U.S. ——, ——, 109 S. Ct. 706, 724 (1989) (assertions of "remedial" purposes are entitled to "little or no weight" in the absence of particularized findings of prior discrimination by the governmental entity or in the industry in question).

Moreover, whatever relevance that *Fullilove v. Klutznick*, 448 U.S. 448 (1980), still has as to *Congress's* authority under Section Five of the Fourteenth Amendment to remedy societal discrimination, see, *e.g.*, *Croson*, —— U.S. at ——, 109 S. Ct. at 740 (Marshall, J., dissenting) (*Croson* represents a "deliberate and giant step" away from *Fullilove*), Congress in its appropriations acts for fiscal years 1988 and 1989 did not enact the female preference into law to remedy any Congressional findings of societal discrimination against women. *Winter Park*, *supra*, 873 F.2d at 363-365 (Williams, J., concurring in part and dissenting in part) [Cert. Pet. App. 34a-35a]. Rather, Congress merely ordered the reinstatement of previous FCC preferences, which Judge Williams aptly characterized as ordering "a kind of mental stand still." *Id.*

whether the classification is based upon "overbroad generalizations" which are entirely unrelated to any differences between men and women." *Parham v. Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion). Accordingly, whether the governmental entity responsible for the classification "extensively considered" whether males and females differ in the way that the classification presupposes is an important consideration. *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981). To put the matter another way, whether the government undertook to create a substantial factual record establishing that men and women do differ as is claimed is highly relevant. See, *e.g.*, *Caban v. Mohammed*, 441 U.S. 380 (1979) (striking down a statute that permitted the adoption of children without the consent of unwed fathers but not without the consent of unwed mothers; the State's arguments that unwed mothers were more likely to be living with children, and that the whereabouts of unwed fathers were often unknown, were overbroad and inaccurate generalizations about males); see also *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 151-152 (1980); *Michael M. v. Superior Court*, 450 U.S. 464, 501 (1981) (Stevens, J., dissenting).

In this instance, the FCC has never offered "any reason, policy, fact, finding or citation to explain or support the sudden and gratuitous announcement of its [gender-based] preferential policy," *Steele v. FCC*, 770 F.2d 1192, 1197 (D.C. Cir. 1985), *reh'g granted and opinion vacated* (Oct. 31, 1985) save for its generalized assertions that

> [w]omen are a general population group which has suffered from a discriminatory attitude in various fields of activity, and one which, partly as a consequence, has certain separate needs and interests with respect to which the inclusion of women in broadcast ownership and operation can be of value.

Mid-Florida Television Corp., 70 F.C.C.2d 281, 326 (Rev. Bd. 1978), *set aside on other grounds*, 87 F.C.C.2d 203

(1981). Needless to say, this rationale suggests a *remedial* purpose rather than an effort to foster "diversity" in programming.[15] To the extent that the *Mid-Florida* statement is a rationale for diversity, it doesn't even begin to answer the question of how "diversity" in the sexes of owners and operators of broadcast facilities results in more diverse *programming*.

To the extent that the Commission's feeble *Mid-Florida* explanation for the preference policy is an assertion that men and women as groups have distinctive interests or views, this Court has previously dismissed such undocumented assertions:

> In claiming that women might have a different attitude * * * or that the organization's public positions would have a different effect if the groups were not "a purely young men's association," the Jaycees rely solely on *unsupported generalizations about the relative interests and perspectives of men and women.* * * * Although such generalizations may or may not have a statistical basis in fact with respect to particular positions adopted by the Jaycees, we have repeatedly condemned legal decision-making that relies uncritically on such assumptions.

Robert v. United States Jaycees, 468 U.S. 609, 627-628 (1984) (emphasis added) (rejecting First Amendment challenge to state non-discrimination law).

The Commission's generalizations are probably even less defensible than these, since the Jaycees may have been able to cite statistical evidence that males and females tended to differ in controversies of interest to that group. The only basis for the Commission's assumptions is a conclusory statement by the Review Board in the *Mid-Florida* case. The claim that women licensees would broadcast more programs of interest to women than male broadcasters would, or would otherwise enhance the

---

[15] But as noted above, the FCC has expressly renounced any remedial purpose in defending the preference.

"diversity" of programming, even if they were competing for the same markets, has never received empirical validation. Neither has the claim that women, as a class, enjoy different types of programming from those preferred by men.

Better-founded generalizations than the Commission's have often failed to survive review. The cases "have consistently rejected the use of sex as a decisionmaking factor even though the statutes in question certainly rested on * * * predictive empirical relationships." *Craig v. Boren*, 429 U.S. 190, 202 (1976); see also *Los Angeles Dept. of Water & Power v. Manhart*, 435 U.S. 702, 707-708 (1978) (although a pension fund policy was based on the true generalization that women live longer than men, still "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply"); *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083 (1983); *Hogan, supra*, 458 U.S. at 726 n.12. But the Commission "has been unable to offer any evidence other than statistical underrepresentation to support its bald assertion that more women station owners would increase programming diversity. "Instead, a few Commission employees without any evidence, reasoning, or explanation, gratuitously decreed one day that female preferences would henceforth be awarded." *Steele, supra*, 770 F.2d at 1199.

Beyond the failure of the Commission to offer any empirical evidence to support its assertions that sexual diversity in broadcast ownership and management somehow enhances diversity in programming, the *Steele* court demonstrated that such assertions are manifestly unreasonable:

> Whatever the merit of these assumptions [that members of ethnic minority groups have distinct tastes and perspectives, and that these differences will be reflected in distinctive editorial and entertainment programing] as applied to cohesive ethnic cultures, it simply is not reasonable to expect that granting preferences to women will increase programing diversity. Women transcend ethnic, religious, and other cultural barriers. In their social and political opinions and beliefs, for example, women in fact appear to be just as divided among themselves as are men. Therefore it is not reasonable to expect that a woman would manifest a distinctly "female" editorial viewpoint.

Steele, 770 F.2d at 1199. Thus, even under a rationale basis standard of view, the Commission's female preference would not pass constitutional muster.

In sum, the Commission relied upon its own speculation and conjecture to establish a gender-based classification, a practice of governmental entities that this Court has repeatedly rejected, and should do so again in this case.

CONCLUSION

The Court is properly presented with the constitutionality of the Commission' gender preference in comparative license proceedings. The Court should address that question, and hold that the Commission's failure to demonstrate that its gender preference is substantially related to the Commission's proffered goal of programming diversity renders the preference unconstitutional.

Respectfully submitted,

M. MILLER BAKER
DILWORTH, PAXSON, KALISH & KAUFFMAN
1001 Pennsylvania Ave., N.W.
Suite 275 North
Washington, D.C. 20004
(202) 624-5922
Of Counsel

MICHAEL P. MCDONALD
CENTER FOR INDIVIDUAL RIGHTS
2300 N Street, N.W.
Suite 600
Washington, D.C. 20037
(202) 663-9041
Counsel of Record

February 9, 1990